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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE AMERICAN SHIP BUILDING COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals (R. 323-325) is reported at 331 F. 2d 839. The decision and order of the Board (R. 292-308) are reported at 142 NLRB 13[illegible].

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1964 (R. 326, 327). The petition for a Writ of Certiorari was filed on July 6, 1964 and was granted October 12, 1964, 379 U.S. ——, (R. 327). The jurisdic-

tion of this Court rests upon 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' right to strike?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), are set forth in the Appendix infra, pp. 26-29.

SUMMARY OF PROCEEDINGS BELOW

The American Ship Building Company is engaged in shipbuilding and ship repair at its four shipyards located in Chicago, Illinois, Buffalo, New York, Lorain and Toledo, Ohio (R. 259).

On October 24, 1961, Local 374, the Chicago local of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers charged the Company with violating Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended, because after an impasse had been reached in negotiations for a new employment agreement it had locked out its employees (R. 1-4).

A hearing was held in February, 1962 by a Trial Examiner of the National Labor Relations Board who on May 31, 1962 recommended that the complaint be dismissed in its entirety (R. 259-291). The Board on June 21, 1963 by a three to two decision, with Chairman McCulloch and member Rodgers dissenting, held the Company in violation of Sections 8(a)(1) and 8(a)(3) of the Act but dis-

missed the charges of Section 8(a)(5) violations (R. 292-308).

The U.S. Court of Appeals for the District of Columbia Circuit on April 9, 1964 affirmed the decision of the Board; the Board had concluded that the issues were limited to employees in the Chicago shipyard of petitioner (R. 323-325).

STATEMENT OF FACTS

Introduction

All of the shipyards of the Company are adjacent to the Great Lakes. The busy season is between November and April when the Lakes are frozen over and during this period shipowners try to get necessary repairs so that they can operate on the Lakes during the ice-free months (R. 272; 74, 156). In the summer months a skeleton crew of employees is retained to perform yard maintenance, emergency repairs, and to prepare for the winter (R. 273; 74, 78, 191, 213). Accordingly, the Company attempts to have its employment agreement expire on August 1st, so that its customers will not refrain during the winter from bringing in their ships for repairs because of fears of delay due to strikes (R. 285). A strike during the busy November—April season would be an economic disaster for petitioner and for its shipping industry customers.

The Company had a collective bargaining agreement with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers and seven other craft unions which expired on August 1, 1961 (R. 260-261).

In its past bargaining with the Company, the Unions had struck in 1952, 1953, 1955, 1956 and 1958—on each occasion when the collective bargaining agreement was up

for renewal. There had been five strikes in eight years with the 1958 strike lasting ten weeks (R. 147, 262). In addition, there had been two "wildcat" strikes in 1961 (R. 66, 68). In 1955 a slowdown by employees, before the employment agreement expired, caused an 8-million dollar ship to be caught in petitioner's shipyard and lost to its customers for 3 weeks during the customer's busiest season because of the ensuing strike (R. 149, 272).

In December, 1960, over seven months before the expiration of the employment agreement on August 1, 1961, officials of the Company expressed to representatives of the Unions the desire of the Company for early meetings with the Unions to reach an agreement prior to the termination date of the existing employment contract (R. 50-51).

A. *Negotiations Before the Layoff*

In May 1961 the Union and the Company exchanged proposals for a new contract. The first bargaining session was held on June 6, 1961 in Cleveland, Ohio with representatives of all parties present. Bargaining continued in earnest at subsequent meetings of the parties held on June 19, 20, 21, 22 and 23, July 5, 6, 19, 20, 28, 29, 30, 31, 1961 (R. 25, 26, 262-264).

At the first meeting on June 6, 1961, the Executive Vice President of the Company stressed the extremely poor business conditions facing the shipbuilding industry on the Great Lakes at that time. (The deteriorating condition of the ship construction industry on the Great Lakes was fully explained to the Union representatives on many occasions.) He requested that rates of wages be kept constant until competitors' rates (which were, in at least one instance, as much as 42¢ per hour less than petitioner's) caught up with those paid by the Company. At the same meeting the Unions' chief negotiator stated that he under-

stood there had been a strike during each and every negotiation but he hoped the parties could reach agreement without a strike. Oral assurances that work would be completed by employees were also given by local Union representatives (R. 53, 54, 98, 110, 137-39, 262).

Negotiations continued through June. On June 20 the Union requested fringe benefits estimated by the Company to cost 28¢ per hour and by the Unions 20¢ per hour. On July 5 and 6 the Unions revised downward some of their fringe benefit requests but added a request for 10¢ per hour for pensions. On July 6, the Company suggested that the Federal Mediation Service be called in (R. 262, 263).

At a meeting on July 19, the Unions demanded an across the board wage increase of 20¢ per hour in addition to other fringe and pension benefit requests (R. 263-264). Also, on July 19, the Unions proposed a six-month extension of the agreement but the Company refused because the contract would then expire in its busiest season when it would be most vulnerable to strike action (R. 263-264, 271). During the July 20 meeting, while discussing wages, the Unions' chief negotiator sharply reminded the Company representatives that in 1958 it had also pleaded financial inability to pay a wage increase but that after a 10 or 12 weeks strike it had yielded and submitted to the Unions' demand and had not been forced out of business. He added that the Unions did not wish to strike (R. 57, 263-264, 271).

On July 31, the last day of the existing labor contract five or six major issues primarily wage and fringe monetary benefits remained in disagreement. The Company presented two proposals but the Unions rejected both and then made a counter-proposal which the Company in turn rejected. The Company asked that its proposals be sub-

mitted to the employees for a vote and the Unions agreed but said they would not recommend their adoption. The Company refused to extend the old contract until a new one was agreed upon but the parties then agreed to an extension of the old contract until the membership of the Union could vote on the Company's proposals. (J.A. 34-35, 112-113, 264). The employees continued to work after the contract expired (J.A. 37, 144).

On August 8 the Unions informed the Company that its proposals had been rejected by a vote of their members. The Union representative in response to an inquiry from the Company representative said the Unions did not then intend to strike (R. 264). On August 9, the parties met again and the Company made another offer of a three year contract with a wage increase of 5¢ per hour each year of the contract. *The Unions refused to submit this offer to their members for a vote and made no counter proposal.* Plans for further meetings were left unsettled. *An impasse in the bargaining had been reached* (R. 265).

Prior to the expiration of the contract on August 1, 1961, some of the Unions had authorized a strike by an overwhelming vote (R. 58). The Company thus had a sound foundation for its fear of a strike on the part of the Unions (R. 263, 271). This fear was evidently shared by the Conciliation Commissioner of the Federal Mediation Service (R. 60) who requested assurances from the Unions that no precipitous strike action take place. The request was not answered until August 2,—after the expiration of the labor agreement—and the assurance then given was limited to a promise that no strike action would take place before a meeting scheduled for August 7, 1961 (R. 257).

The Company representative said that throughout the negotiations no one had been heard to say that the Unions

would not strike (R. 177-178). The Chief Negotiator for the Unions admitted *that despite his oral assurances that there was no intention to strike, it was debatable whether he could have stopped the Union locals from calling a precipitous strike* (R. 66, 271).

B. *The Layoff and Subsequent Events*

After a meeting of Company officials on August 10, action was taken by petitioner on August 11, 1961 to close down its operations and temporarily lay off its personnel in the Chicago and Toledo shipyards, where no jobs of importance were on hand. The last vessel on which repairs had been made had left the Chicago shipyard some three weeks prior to the closedown of August 11, 1961 (R. 74, 148, 151, 272, 273, 274, 303). In Buffalo, men were to be laid off as the work was completed. A large vessel was being worked on in the Lorain shipyard and the work force there was retained with gradual reduction and layoffs as the work was completed (150-151, 243-247, 272). The layoff notices given employees gave the cause of the action as "the labor dispute which has been unresolved since August 1, 1961"[1] (R. 265-266).

The Mediation Service called further meetings of the parties on August 19, 20 and 28 when the Company made new proposals and the Union rejected them. The deadlock continued primarily because the Unions refused to accede to an August 1st termination date for any new contract. (R. 266-267).

Further meetings were held on October 20, 21 and 22. On October 27, 1961 a final agreement for a two year contract expiring on August 15, 1963 was agreed upon

[1] The layoff notices were worded in this manner because of legal provisions of the unemployment compensation statutes of Ohio, New York and Illinois (R. 267, 129-131, 290-291).

and signed. Despite the fact that the Company negotiator was informed on the morning of October 27 that unfair labor practice charges had been filed against the Company, he attended the meeting scheduled for that morning and executed the new contract just as it had been agreed upon. (R. 267, 65, 131). Immediately after the new labor agreement was executed on October 27, 1961, the employees at the Chicago shipyard were called back to their jobs thus ending the temporary layoff. (R. 73-74, 267, 274).

C. *The Board's Decision and Order*

The Board, with Chairman McCulloch and Member Rodgers dissenting, disagreed with its Trial Examiner and found that the Company had violated Sections 8(a)(1) and 8(a)(3) of the Act. The Board stated in part:

> ". . . where the Union has given the employer assurances that no sudden strike would be called, or that, in the event a strike were called, adequate safeguards would be taken by the Union to protect the employer's facilities and work commitments during the course of the shutdown, a lockout is illegal; for in such a situation the lockout is deemed an offensive weapon intended to force the abandonment of the Union's contract demands and the acceptance of the employer's (R. 295-296).

The Company was ordered to cease and desist from its unfair labor practices and to reimburse its employees at the Chicago shipyard for lost pay (R. 298-300).

The Court of Appeals directed that the Board's order be enforced (R. 323-325).

SUMMARY OF ARGUMENT

The entire industrial relations structure in this country is based upon a system of free collective bargaining. The objective of collective bargaining is to secure an employment agreement between labor organizations and management. The pressures, strategy and tactics utilized by the parties to secure this objective have often required the use of strikes and lockouts. They were permitted before the Wagner and Taft-Hartley Acts and are not now barred by provisions of those Acts except under certain limited circumstances.

The National Labor Relations Board and the Courts have held lockouts to be legitimate under the Taft-Hartley Act in a multi-employer bargaining situation, and in cases where unusual economic hardship is involved.

The Board's position on lockouts has been inconsistent and vacillating. In the early days after Congress passed the Taft-Hartley Act it held multi-employer lockouts illegal even though union "whipsaw" strike tactics had been used. Then it gave approval to the legality of such lockouts which was approved by this Court. It has also said that lockouts to avoid unusual economic hardships and special operational problems may be lawful under certain circumstances. On the other hand, it has held bargaining lockouts when an employer seeks to exercise economic pressure on the Union to accept his demands to be offensive tactics which it contends are illegal under the Act.

The Board characterizes a bargaining lockout as offensive action which infringes upon the strike and other concerted Union activity which it contends are protected under Section 7 of the Act. The Board asserts that where such a lockout takes place it has the function of resolving the conflict between the legitimate interests of the parties.

What is most significant here, however, is that the Board has failed to explain why a lockout in a multi-employer situation *fails* to infringe upon protected concerted activities, while in a single employer lockout *it does*. Likewise, the Board has not suggested how a discharge and replacement of economic strikers (which has been held to be legal) harmonizes with its view that a temporary layoff if directed by a single employer is illegal, and if directed by a multi-employer unit is legal. Indeed, the Board even continues to claim that it has the power to decide how much, when and what kind of economic pressure an employer can use to secure agreement on his bargaining demands despite a decision of this Court which clearly states that it has not been delegated power to act as an arbiter in such a situation.

ARGUMENT

I

A LOCKOUT IS NOT ILLEGAL PER SE AND, INDEED, IT IS AN INTEGRAL AND NECESSARY PART OF AN EQUITABLE COLLECTIVE BARGAINING PROCESS.

A. *A lockout is not illegal per se.*

While no specific statutory provision is violated by an employer's lockout action[2], the National Labor Relations Board has generally sought to condemn such conduct. It has been the Board's view that the strike and other concerted actions of a labor organization are "protected" under Section 7 of the Act and that a lockout is a reprisal

[2] *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 92.

for and infringes upon the employees' resort to such activities and is therefore contrary to the statutory purposes of the Act.[3] This is the basic position of the Board as to a single employer lockout such as is here involved. But this position is qualified by various exceptions which plainly reveal the error and inconsistency of the Board's interpretation of the Act.

The Board's erroneous position on individual employer lockouts is in stark contrast with its position on the legality of lockouts where multi-employer bargaining is involved. If a number of employers in an industry bargain jointly with a Union for a master contract and if an impasse is reached in the bargaining and the Union strikes one employer of the bargaining unit, the other companies in the bargaining unit can legally lockout their employees to avoid what is popularly known as the "whipsaw" effect which occurs when individual employer members of the bargaining unit are struck one at a time by the Union.[4] The Board[5] and this Court have given approval to the legitimacy of such a lockout under the Taft-Hartley Act in *NLRB* v. *Truck Drivers Local Union No. 449* 353 U.S. 87.

Moreover the Board has recognized as another valid exception to its basic rule a lockout by which an employer

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[3] It is well-accepted law (*NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333) that an employer can lay off and replace economic strikers with permanent replacements. Is not such action equally a reprisal for protected concerted activity? Actually, replacement of strikers and attempts to operate a plant with strikebreakers may well lead to violence, whereas a lockout avoids such problems.

[4] Why a multi-employer lockout fails to interfere with the Unions' protected right to strike while a single employer lockout constitutes such interference is not only difficult to perceive but also appears to deny to single (and in most instances small) employers the equal protection of the law.

[5] *Buffalo Linen Supply Co.*, 109 NLRB 447.

seeks to avoid extraordinary economic or operational losses threatened by an imminent strike.[6]

These distinctions which the Board has attempted to draw between legal and illegal lockouts under the Taft-Hartley Act are completely unrealistic but they do point up the fact that even the Board agrees that a lockout may be legal. Certainly there is nothing in the statute which says that a strike which will cause an employer great or unusual loss permits him to take an action which would be unlawful if the strike involved only minor inconveniences. And, yet, this is the rule of law enunciated by the Board. We submit that it is unsound to hold that the degree of hardship enforced should be the criterion for judging an employer's right to resort to the protection afforded him by a lockout.

B. *The right to lockout is an integral part of an equitable collective bargaining process.*

The objective of the mutual bargaining effort of both labor organizations and employers is to secure the most favorable employment contract possible. Economic pressure through the use of the strike or the lockout is and has always been normal and permissive in collective bargaining.[7] It could not function fairly and effectively unless this was the case. The lockout however, must be used to secure the economic advantages available to an employer, to protect his business and to counter the economic strength of the adversary in the bargaining process,

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[6] *Duluth Bottling Association*, 48 NLRB 1335 (1943); *International Shoe Co.*, 93 NLRB 907 (1951); *Betts Cadillac*, 96 NLRB 268 (1951); *Packard Bell Electronics Corp.*, 130 NLRB 1122 (1961); *Building Contractors of Rockford*, 138 NLRB 1432 (1962); *Associated General Contractors*, 138 NLRB 1405 (1962).

[7] *NLRB* v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 477.

but it would be violative of Section 7 of the Act if it were used to frustrate the organizational efforts of a labor union or to discourage membership in the union. In the instant case, the lockout of the American Ship Building Company was in no sense anti-union but purely an effort to preserve and protect the business of petitioner.

That the countervailing weapons of strike and lockout are used by unions and employers to protect their respective interests is well recognized and accepted. In their work, *Organized Labor,* (1945) Millis (a former Board Chairman) and Montgomery state (p. 554):

> "In exerting pressure upon employers to recognize them and accept their demands, unions . . . resort to the strike. . . . The employers resort to corresponding methods—the *lockout* . . . .
>
> "The strike has been and is organized labor's great weapon when differences are not settled by conciliation, mediation, or arbitration. From its use or threatened use the union obtains most of its power in the industrial field. *Its counterpart on the employer's side and matching it fairly accurately, is the lockout.*" (Italics supplied).

The history of the lockout's use shows that it has been a legal weapon of employers for many years. Prior to the Wagner Act [8] the lockout was practiced without legal restriction by single employers or voluntary associations of interested employers. In the case of *Iron Molders Union* v. *Allis Chalmers Co.,* 166 F. 45, 52 the Seventh Circuit, in 1908 held that employers may use the lockout at will and that the right to its use by employers paralleled the right of employees to strike.

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[8] 49 Stat. 449.

The general understanding of industry and labor as to the permissibility of the use of lockouts in collective bargaining is evidenced by a report entitled, *Basic Patterns in Union Contracts*, issued by the Bureau of National Affairs in April 1961; based on a sample of 400 collective bargaining contracts in force in 1960 the report states at page 77:1,

> "Some form of no-strike clause appears in about 94 percent of union contracts . . . Ordinarily, no strike pledges are paralleled by similar pledges from management regarding lockouts. These appear in 84 per cent of contracts, up from 76 per cent in 1957."[9]

Section 8(d) of the National Labor Relations Act, as amended by the Taft Hartley Act defines the terms "to bargain collectively" and sets forth the steps which must be taken by a party to a collective bargaining contract in order to modify or terminate the contract. After setting forth some of the steps which must be taken, Section (d) provides in sub-paragraph 4:

> . . . [the party desiring termination or modification shall] continue(s) in full force and effect, *without resorting to strike or lockout*, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." (Italics supplied).

This obvious recognition of the validity of a lockout is strongly supported by the legislative history underlying

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[9] To the effect that most collective bargaining contracts contain a "no strike-no lockout" provision, also see Bulletin 908-13, Bureau of Labor Statistics, pp. 1-3.

Section 8(d)(4) and other sections of the Act.[10] It should be noted that one of the major objectives of the Taft Hartley Act was to insure employers and employees complete equality of rights and responsibilities in the field of collective bargaining. A denial of the right to lockout would frustrate the equality of rights which it was the purpose of the Act to achieve.[11]

This Court in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 92, 93 more recently held that neither the Wagner Act nor the Taft Hartley Act prevented the use of the lockout by employers. Mr. Justice Brennan at pages 92 and 93 of the opinion said:

> "Although as the Court of Appeals correctly noted, there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful per se. Legislative history of the Wagner Act, 49 Stat. 449, indicates that there was no intent to prohibit strikes or lockouts as such. The unqualified use of the term "lockout" in several sections of the Taft Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon. This conclusion is supported by the legislative history of the Act."

This Court also pointed out at page 92, fn. 16, of its decision that Sections 203(c), 206 and 208(a) of the Taft

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[10] See the following reports, 80th Cong., 1st Sess.: HR. Conf. Rep. No. 510, p. 35; HR. Rep. No. 245, pp. 21 and 22; HR. Minority Rep. No. 245, pp. 70, 82; S. Rep. No. 105, p. 24; S. Rep. No. 105, pt. 2, p. 21; also see 93 Cong. Record 1893, 1894.

[11] See the remarks of Senator Taft, one of the sponsors of the amended Act, to the effect that "the basic theory of the entire bill, that is, an attempt to create equality between the employer and the employee," Vol. 2, p. 1206, *Legislative History of Taft Hartley Act of 1947.*

Hartley Act evidence the intent of the Congress to recognize the legality of lockouts under the Act.

That there are areas in which lockouts can be and are lawfully used under both the Wagner and the Taft Hartley Acts is thus clear. However, the limits of the area in which a lockout can be lawfully used have not been heretofore fully determined by this Court. In the *Truckers* case, *supra*, the multi-employer lockout there involved was held to be lawful. The Court in that decision also pointed out that "there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *Truckers* case, supra, at pp. 92, 93. But the Court did not feel called upon "to define the limits of the legitimate use of the lockout" or "to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike" (p. 93, fn. 19).

Quite significantly this Court, in that decision stated (p. 96):

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."

Without question both single and joint employers are entitled to use self-help. If the continuance of a joint bargaining arrangement has been considered of sufficient importance to justify a multi-employer lockout, it should be recognized that it is equally important for a single employer to be able to utilize "self-help" to hold his customers and to protect the financial integrity of his business.

In the present case bona fide negotiations took place between petitioner and the Unions. There is no intima-

tion that the lockout was designed to frustrate Union organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.[12] If the lockout is not thus unlawfully motivated, then, as demonstrated by the *Truck Drivers* case, supra, and as otherwise recognized by this Court in that case, it is not illegal just because it interferes with the timing[13] or efficacy of a strike or other lawful concerted activity of employees. See *NLRB* v. *Great Falls Employees Council*, 277 F. 2d 772, 776, note 7.

NLRB v. *Mackay Radio & Tel. Co., supra*, 304 U.S. 333 demonstrates the validity of this position. In that case the right to replace economic strikers was sustained. Such replacement certainly interferes with the exercise of concerted activities by employees. In fact, it is hard to visualize more direct interference or a more coercive act that can be directed against economic strikers to influence them to yield to the employer's terms. In the instant case there was only a temporary layoff of employees on August 11, 1961. In contrast, in the *Mackay* case the employer permanently replaced economic strikers. Thus,

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[12] Cases cited fn. 18, p. 93, *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87; also see *NLRB* v. *Cape County Milling*, 140 F. 2d 543, 545; *NLRB* v. *Anchorage Businessman's Association*, 289 F. 2d 619; *American Vitrified Products Co.*, 127 NLRB 701 (lockout to force union to remove two non-employees from its bargaining committee); *Ralph's Wonder Inc.*, 127 NLRB 1280 (lockout in retaliation for attendance by employees at Union meeting); *Madison Glass Specialty Co.*, 135 NLRB 901 (lockout to compel employees to join different Union at plant to which work was transferred in face of 60 day Union security clause at such plant without giving employees right not to join new Union for such 60-day period).

[13] The Board erroneously contends that a lockout during contract negotiations interferes with full enjoyment of the right to strike by depriving a union of the opportunity to "time" the shutdown. The right to strike does not carry with it as an attribute any protected right to "time" the calling of a strike so that it will succeed. The Taft-Hartley Act does not say that a labor organization has a right to strike before an employer can exercise his right to shut down. There is no guarantee in the Act that a strike, if called, will be successful.

in *Mackay* there was not merely a lockout but actually a termination of employment for the strikers. Yet the *Mackay* case shows plainly that this interference was not unlawful, was not in and of itself an unfair labor practice and that an employer can protect his business by replacing economic strikers.

Other cases support the principle that not every kind of concerted activity of a union is protected in the sense that by interfering with the effectiveness of such activity, an employer commits an unfair labor practice. In *NLRB* v. *Draper Corp.*, 145 F. 2d 199, 202 (CA 4) (1944) employees, who engaged in a wildcat strike, that is, a strike by a minority group, were discharged. They were attempting to compel their employer to deal with them contrary to the rights of the collective bargaining agent chosen by the majority. The Court though recognizing the legality of a minority group strike, held that where they struck to force the employer to bargain with them, they did so at their peril insofar as reinstatement was concerned and nothing in the Act protected them from discharge. Also see: *NLRB* v. *Indiana Desk*, 149 F. 2d 987, 992-993 (CA. 7) (1945).

Obviously an employer who refuses to make concessions to a union at the bargaining table, is interfering with lawful concerted activities but is exercising his lawful right under the Act. Such refusal by an employer may ultimately weaken the union so as to make it yield to his terms. He is thus "interfering" with it, but no one would argue that he has thus committed an unfair labor practice.

II

PETITIONER MAY LEGALLY EXERT ECONOMIC PRESSURE BY A LOCKOUT IN ORDER TO SECURE A COLLECTIVE BARGAINING AGREEMENT.

It has been pointed out above that a lockout is not illegal per se, that the Taft-Hartley Act recognizes its legality and that it has a long history of lawful use. Furthermore, a lockout may be legal even though it interferes with strikes or other concerted employee activities. Indeed, a lockout is the corollary of the strike since it constitutes the employer's means of exerting economic pressure on the unions. And, we submit, it cannot seriously be questioned that this is true irrespective of whether a lockout is used in an individual or multi-employee bargaining unit situation. We believe that four Circuit Courts of Appeals support this view.

In *Morand Bros. Beverage Co.* v. *NLRB,* 190 F. 2d 576, after remand, 204 F. 2d 529, cert. denied, 346 U.S. 909, the Court of Appeals for the Seventh Circuit said the temporary lockout,

> "*. . . should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the Union, a corollary of the Union's right to strike.*" (Emphasis supplied) (190 F. 2d at p. 582).

In *Leonard et al.* v. *NLRB,* 197 F. 2d 435, after remand, 205 F. 2d 355, the Court of Appeals for the Ninth Circuit seemingly agreed with the views of the Seventh Circuit that a lockout is the corollary of the strike. It held that employers can resort to the lockout when faced with "whipsaw" strike tactics in a multi-employer bargaining unit. In *NLRB* v. *Continental Baking Co.,* 221 F. 2d 427,

the Court of Appeals for the Eighth Circuit made a similar ruling.

The *Dalton Brick and Tile Corp.* case, 301 F. 2d 886, (1962) was a single employer lockout in a bargaining context. Although the Court of Appeals for the Fifth Circuit did not expressly hold that a lockout was a corollary of a strike. it strongly indicated that it agreed with the Seventh Circuit in *Morand Bros.* and the Ninth Circuit in *Leonard et al.*

In the *Dalton* case, the Trial Examiner, whose findings were upheld by the Board, found the lockout illegal because it was for the primary purpose of enhancing the employer's bargaining position and the ultimate acceptance of its contract demands. The Court refused to enforce the Board's Order, rejecting the view that a single employer lockout to obtain a bargaining advantage would be presumptively illegal.[14] It said that its approach would be:

> ". . . to match the employer's conduct under review against specific provisions of the Act to see whether, within the accepted limits of judicial revew, there is substantial evidence of actions which constitute violations of standards prescribed by Congress". (301 F. 2d at p. 894)

Under the doctrine of the *Dalton* case, the lockout of petitioner on August 11, 1961 would be permissible, since there is no evidence of record, and the Board does not

[14] That a lockout is presumptively illegal in a single employer situation was in effect the holding of the Board in the instant case where the petitioner was faced with: (1) loss of its customers if the Unions' strike threats materialized, (2) a vote of Union locals authorizing a strike, (3) a history of five strikes on each of five occasions when a new contract was being negotiated, (4) a refusal by the Unions of an offer by the employer to renew the old contract for one year (R. 177), (5) a Union refusal to vote on the last offer of the employer, and (6) a complete impasse in the bargaining negotiations.

even contend, that it was used for any purpose such as to obstruct union organization or to subvert the effectiveness of a collective bargaining representative. This position also finds support in two earlier decisions of the Board in *Lengel-Fencil Co.* 8 *NLRB* 988 (1938) and *Clayton & Lambert Manufacturing Co.* 34 NLRB 502 (1941).[15]

The decision of the Board here should be recognized for what it is and struck down as another attempt to do by administrative fiat what the Congress did not do, namely, to abolish the right to lockout if used in a way to counter pressure from a union. Without question Section 8(d)(4) as well as Sections 203(c), 206 and 208(a) equate "lockouts" with "strikes" under the Act and recognize the legality of both as a means of exerting economic pressure. The Board's position would require an employer to maintain a position of maximum vulnerability to strike action. It would discriminatorily deny to single and largely small employers their right to "self-help" when the legitimate interests of employers and employees collide in the collective bargaining process—a right already enjoyed by multi-employer bargaining groups. *Truck Drivers Local Union No. 449,* supra at p. 96.

The Board here has failed to give proper consideration to the design of the statute to allow either side to exert its

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[15] The decisions of the Court of Appeals for the Tenth Circuit in *Utah Plumbing and Heating Contractors Association* v. *NLRB,* 294 F. 2d 165 and of the Court of Appeals for the Third Circuit in *Quaker State Oil Refining Corp.* v. *NLRB,* 270 F. 2d 40, cert. denied 361 U.S. 917, held the lockouts there involved to be illegal but both are clearly distinguishable from the instant case. In the *Utah* case there was a threat of a lockout during negotiations unless the Unions brought about acceptance of the employer's last offer. No impasse was reached in the bargaining and no critical operational problem or hazard of economic loss confronted the employer. In *Quaker State* there were written assurances of no strike by the Union; the shutdown took place while bargaining was going on; the Union agreed to submit the last proposal of the Company to a vote of the membership. None of these facts were present in the case here under consideration.

full economic power in its bargaining relationship with the other. As this Court said in *NLRB* v. *Insurance Agents' International Union AFL-CIO*, 361 U.S. 477, 489-90: "The presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." Petitioner here simply resorted to an economic lockout as part of its bargaining strategy—a clearly permissible and legal self-help action on its part.

The interests of the petitioner and the Unions have collided in this case. The Company was faced with demands for wages far in excess of those paid by its competitors. It would have been foolhardy to allow the Unions to postpone the bargaining crisis until the busy season of petitioner began. Without question this would have forced its capitulation. The Company and its customers could not afford even a short strike during its busy season. Even the Board has recognized that an employer does not have to wait for a strike to begin before it can take protective action. *Betts Cadillac Oldsmobile Inc.* 96 NLRB 268.

What the Board has actually done in this case is exactly what it was warned not to do by this Court in *NLRB* v. *Insurance Agents' International Union, AFL-CIO, supra.* Although the question at issue there was concerned with whether good faith bargaining under Section 8(a)(5) of the Act had taken place, the Court made clear from its decision that the Board could not act as an arbiter of the sort of economic weapons which the parties could use in collective bargaining. In ruling that the use of the lockout by petitioner was illegal the Board moved out of its area of delegated powers and into an area that deprives petitioner of the very "self-help" to which the Court in the *Truck Drivers* case, supra, said

an employer was entitled to resort in the collective bargaining process.

In the *Insurance Agents' International* case, supra, this Court said that when the Board moved into the area of economic sanctions available to the parties with only Section 8(b)(3) for support:

> "... *it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.* It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable, and unjustifiable, proper and 'abusive' economic weapons into the collective bargaining duty imposed by the Act. The Board's assertions of power under Section 8(b)(3) allows it to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard of that section, not drafted with reference to specific forms of economic pressure. We have expressed our belief *that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.*" (361 U.S. 497-98) (Emphasis supplied).

Although the quoted statements of the Court refer to section 8(b)(3) of the Act, they would have equal applicability to sections 8(a)(1) and 8(a)(3) which are involved here. The Board's view that a lockout used to advance the bargaining position of the employer would be illegal, conflicts with the interpretation of the Act by this Court in the *Insurance Agents* case, supra. When the Board, as it has in this case, invades an area where it decides the economic weapons which the parties can use in seeking

to gain acceptance of their bargaining demands, it has exceeded its powers. Whether this be done under the guise of "balancing conflicting legitimate interests" of the parties or under some other formula cannot and does not legalize the decision.

The Board's position on bargaining lockouts is not based on sound reasoning. It has attempted to design a startling rule of employer conduct—one that was not foreseen by the members of Congress who passed either the Wagner or Taft Hartley Acts—one that is inconsistent, at least with the principles of its multi-employer decisions—one that is not supported by any general weight of opinion among legal authors or experts in the field of labor law,[16] —and one that should be reversed because it is not in accord with the Taft-Hartley Act.

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[16] *Legality of the Lockout*, Koretz, 4 Syracuse Law Rev. 251 (1953); *Lockout Revisited*, Koretz, 7 Syracuse Law Rev. 263 (1956); *Single Employer and Multi-Employer Lockouts Under the Taft Hartley Act*, Meltzer, 24 U. of Chicago L.R. 70 (1956); *Lockouts Under the LMRA, New Shadows on an Old Terrain*, Meltzer, 28 U. of Chicago L.R. 614 (1961); *The Right to Lockout*, Littler, ABA Section on Labor Relations 4 (1952); *Is the Lockout the Corollary of the Right to Strike*, Denbo, 14 Labor Law Journal, 400 (1963); *Permissibility of Lockouts, Shutdowns and Plant Removals*, 50 Columbia Law Rev. 1123 (1950); *Lockout*, Sweetall and Aiges, 9 Labor Law Journal 43 (1958); *Lockouts: Licit and Illicit*, Meltzer, 16th Annual Conf. on Labor, NYU 19 (1963); *Government and Labor*, Northrup and Bloom, 205-210 (1963); *Public Regulation of Collective Bargaining*, Dunlop, ABA Section on Labor Relations 47 (1953); *Policy Making of the New "Quasi-Judicial" NLRB*, Rattner, 23 U. of Chicago L. Rev. 12, 17 (1955); 11 Vanderbilt Law Rev. 246, 248 (Note 11) (1957); *Government Regulation of Industrial Relations*, George W. Taylor, pp. 13-15, 53 (1948); *Extension of Employer Right to Lockout*, 50 Northwestern Law Review 240 (1955).

CONCLUSION

For the foregoing reasons, petitioner urges that the decision of the Court of Appeals is in error and should be reversed and the Order of the National Labor Relations Board should not be enforced.

Respectfully submitted,

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APPENDIX

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 et seq.) are as follows:

Sec. 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * * * *

Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obliga-

tion of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: (61 Stat. 140; 5 U.S.C. 158(a)(1), (3), (d)(4)).

* * * * * * *

Sec. 203.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any

duty or obligation imposed by this Act. (61 Stat. 153; 5 U.S.C. 173(c)).

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Sec. 206.

Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public. (61 Stat. 155; 5 U.S.C. 176).

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Sec. 208(a).

Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate. (61 Stat. 155; 5 U.S.C. 178(a)).